Supr
05-981 FEB 3 - 2006
No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NAVY FEDERAL CREDIT UNION, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether under Title VII of the Civil Rights Act of 1964, a Fair Employment Practice Agency's nearly four year delay in investigating and prosecuting a charge of discrimination can be imputed to the Equal Employment Opportunity Commission ("EEOC") for purposes of a laches defense in an action brought by the EEOC six years after the filing of the original charge.

PARTIES TO THE PROCEEDING

RULE 29.6

Pursuant to Supreme Court Rule 29.6, Navy Federal Credit Union states that it does not have any parent corporations nor are there any publicly held companies that own 10% or more of its stock.

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The published opinion of the United States Court of Appeals for the Fourth Circuit in *Equal Employment Opportunity Commission v. Navy Federal Credit Union*, Case No. 04-2058, 424 F.3d 397, filed September 13, 2005, vacating the judgment of the District Court in favor of Petitioner, is reproduced in the Appendix hereto. (Pet. App. 1a-28a).

The unpublished memorandum order of the United States District Court for the Eastern District of Virginia (Alexandria Division) in *Equal Employment Opportunity Commission v. Navy Federal Credit Union*, Case No. 03-543-A, filed June 18, 2004, granting Petitioner's motion for summary judgment, is reproduced in the Appendix hereto. (Pet. App. 29a-40a).

The unpublished order of the United States Court of Appeals for the Fourth Circuit in *Equal Employment Opportunity Commission v. Navy Federal Credit Union*, Case No. 04-2058, filed November 8, 2005, denying Petitioner's petition for rehearing and petition for rehearing en banc, is reproduced in the Appendix hereto. (Pet. App. 41a).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 13, 2005. Petitioner timely filed a petition for rehearing and rehearing en banc on October 7, 2005, which was denied by the Court of Appeals on November 8, 2005. (Pet. App. 41a).

This petition for writ of certiorari is filed within 90 days of the date of the Court of Appeals' denial of the Petitioner's petition for rehearing and rehearing en banc pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rule 13.3. This Court has jurisdiction to review on a writ of certiorari the Court of Appeals' judgment pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The pertinent text of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-4(g)(1), -5(c) and (e)(1), and -8(b), along with the EEOC's regulations that are at issue here, 29 C.F.R. §§ 1601.13(a)(3)(i)-(ii) and (c), .70(a), .74(a), .75(a), and .80, are set out in the Appendix to this Petition pursuant to Supreme Court Rule 14.1(f) because the statutory and regulatory provisions involved are lengthy. (Pet. App. 42a-54a).

STATEMENT

Petitioner seeks review of the ruling of the United States Court of Appeals for the Fourth Circuit which held that a nearly four year delay attributable to the Fairfax County Human Rights Commission ("FCHRC") was not imputable to the Equal Employment Opportunity Commission ("EEOC") for purposes of laches. (Pet. App. 20a-23a).

Petitioner seeks review of the Fourth Circuit's ruling because the EEOC regularly "partners" with fair employment practice agencies ("FEPAs") such as the FCHRC by handing off its work to them, and justice dictates that if the FEPA is dilatory to the point of justifying a laches defense, so too is the EEOC in a

subsequent litigation. A different result certifies that the EEOC can subcontract its duties to the most negligent of agencies and thereafter, prosecute a severely handicapped defendant.

The petition arises out of a March 25, 1997 administrative charge of discrimination filed with the FCHRC by an employee of Navy Federal Credit Union ("Navy Federal"), Tammy Simms, alleging that her former supervisors, including Donna Santos, discriminated against her. (Pet. App. 10a; C.A. J.A. 240).[1] The charge was sent to the EEOC for cross-filing two days later (Pet. App. 10a), with notice provided by the EEOC to Navy Federal on March 31, 1997 (C.A. J.A. 241). The FCHRC took the lead during investigation. (Pet. App. 10a-11a).

Navy Federal responded to Ms. Simms' charge on May 15, 1997. (Pet. App. 10a). Four months later, the FCHRC requested additional information, which was provided on September 16, 1997. (C.A. J.A. 242). Two weeks later, the FCHRC conducted an interview of one of Ms. Simms' supervisors. (C.A. J.A. 266). Eighteen months passed before the FCHRC, on March 11, 1999, again contacted Navy Federal. (C.A. J.A. 252). Navy Federal provided two more employees for interview. (C.A. J.A. 249-50). Almost two years later, on February 6, 2001—and after almost four years in total—the FCHRC issued a cause finding of retaliation and a no-cause finding of discrimination on the Simms

[1] "Pet. App." refers to Petitioner's Appendix attached hereto; whereas, "C.A. J.A." refers to the Joint Appendix filed by the parties in the Court of Appeals.

charge. (Pet. App. 11a).

On March 1, 2001, the FCHRC wrote the EEOC, explaining that it had lost jurisdiction over Ms. Simms' charge two years earlier, on March 24, 1999. (Pet. App. 11a). The EEOC took up the matter, but did not issue its determination of retaliation against Ms. Simms until July 6, 2001. (Pet. App. 11a). In that determination, the EEOC also found that an unnamed supervisor of Ms. Simms had been subjected to retaliation as well. (Pet. App. 11a). On October 2, 2001, the EEOC for the first time identified Ms. Santos by name as that supervisor. (C.A. J.A. 302-03). The EEOC and Navy Federal attempted but failed to conciliate the Santos matter, with the last of the settlement negotiations occurring between September and November 2002. (Pet. App. 11a).

On April 28, 2003, over six years after Ms. Simms filed her charge and two years after the FCHRC issued its determination, the EEOC filed suit in the United States District Court for the Eastern District of Virginia (Alexandria Division) for retaliation pursuant to § 704(a) of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-3(a)—on behalf of Ms. Santos. (Pet. App. 11a). The District Court had subject matter jurisdiction over the EEOC's Title VII claim pursuant to 28 U.S.C. §§ 1331 and 1343(a)(4).

During litigation, Navy Federal learned the reasons for the extraordinary delay. In deposition, the Executive Director of the FCHRC explained that the investigator assigned to the Simms charge was

undergoing significant performance problems and was singularly the cause of the delay.[2] (C.A. J.A. 332-39). Indeed, on April 10, 1997, after Ms. Simms filed her complaint with the FCHRC, the investigator was given a written reprimand, in part, because he did "not seem to understand or appreciate the need to document how we process and handle files in this office." (C.A. J.A. 362). In June 1997, the investigator received another annual performance evaluation stating that he used his time inefficiently and "[m]ay waste time and materials." (C.A. J.A. 363-68). In April 1999, when the Simms charge was still pending, the investigator received an oral letter of reprimand, in part for misplacing a file. (C.A. J.A. 371). On October 5, 1999, the investigator received yet another letter of reprimand for "untimely and unnecessary delay," so much so that his handling of the matter "may have resulted in the complainant losing his/her rights if not processed within our two-year statute." (C.A. J.A. 372-73). The investigator's April 2000 annual performance evaluation was pointedly critical of his handling of the Simms charge, stating: "This is a cause case that has been returned for multiple revisions and for additional investigation." (C.A. J.A. 374-89). On November 17, 2000, the investigator resigned.[3]

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[2] Tellingly, during the Executive Director's deposition, the EEOC repeatedly objected to questions under the deliberative process privilege.

[3] Indeed, the investigator's performance was so dilatory that, as stated, the FCHRC lost jurisdiction of Ms. Simms' case. (Pet. App. 11a).

The District Court granted Navy Federal's motion for summary judgment on several grounds. (Pet. App. 29a-40a). As to Navy Federal's laches defense, the District Court found that the facts of the case satisfied both required elements—unreasonable delay and substantial prejudice. (Pet. App. 37a-39a). As to the unreasonable delay, the District Court held:

> Ms. Simms filed her complaint with FCHRC on April 10, 1997. As a result of significant performance problems on the part of the FCHRC investigator, FCHRC did not issue its findings until nearly four years later on February 6, 2001. As a result of this delay, the EEOC was unable to adopt FCHRC's findings and move forward until July 2001. The Court finds that the failure of the FCHRC investigator to properly conduct the investigation into Ms. Simms' claim was an unreasonable delay.

(Pet. App. 38a).

On September 13, 2005, the United States Court of Appeals for the Fourth Circuit vacated the District Court's judgment in favor of Navy Federal. (Pet. App. 23a). The Fourth Circuit held that unreasonable delay was not shown. (Pet. App. 20a-23a). The Fourth Circuit found "absent a showing that the delaying entity is the agent or alter ego of the party against whom laches is asserted, we are unable to penalize the latter (the EEOC) for the actions of the former (the FCHRC)." (Pet. App. 23a). The Fourth Circuit held that by attributing the FCHRC's delay to the EEOC, the District Court not only erred, but abused its discretion. (Pet. App. 23a).

REASONS FOR GRANTING THE PETITION

A. The Court of Appeals Erred When It Found that the Delay of the FCHRC Cannot Be Imputed to the EEOC

This Court has held that "a defendant in a Title VII enforcement action might still be significantly handicapped in making his defense because of an inordinate EEOC delay in filing the action after exhausting its conciliation efforts." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 373 (1977). There is no question that the FCHRC, and therefore the EEOC, significantly handicapped Navy Federal in this case, and the EEOC's attempts to distance itself from its FEPA partner are unavailing as a matter of fact and law.

In enacting Title VII's enforcement provisions, Congress sought to create a system of cooperation among state and local agencies charged with enforcing parallel non-federal antidiscrimination provisions. Under § 706(c) of Title VII, if the alleged discrimination occurs in a jurisdiction that has a FEPA,[4] the complainant cannot file a charge with the EEOC until 60 days after she begins a proceeding before the FEPA, unless the FEPA proceeding ends before that time. 42 U.S.C. § 2000e-5(c). This system "affords State and

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[4] An agency can qualify as a "FEPA" if the jurisdiction in which the agency is located has fair employment practice laws that prohibit discrimination covered by Title VII, and if the agency has been granted the power to grant relief from such practices. *See* 42 U.S.C. § 2000e-5(c); 29 C.F.R. § 1601.70(a).

local fair employment practice agencies . . . an opportunity to remedy alleged discrimination concurrently regulated by Title VII or the ADA and State or local law." 29 C.F.R. § 1601.13(a)(3)(i). In support of these policies, the EEOC has stated:

> It is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and local agencies. The Commission shall endeavor to maintain close communications with the State and local agencies with respect to all matters forwarded to such agencies and shall provide such assistance to State and local agencies as is permitted by law and as is practicable.

Id.

In order to assist the EEOC and FEPAs in their parallel roles, Congress granted the EEOC authority to enter into "worksharing agreements" with FEPAs.

> [T]he Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any case or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section.

42 U.S.C. § 2000e-8(b); *accord* 29 C.F.R. § 1601.13(c); *see also* 42 U.S.C. § 2000e-4(g)(1) (stating that "[t]he Commission will have power to cooperate with and,

with their consent, utilize regional, State, local, and other agencies").

The EEOC asserts that of the more than 100 FEPAs, it "has cooperative relationships with all but a few of them." U.S. Equal Employment Opportunity Commission Web Site, *State and Local Agencies*, http://www.eeoc.gov/employers/stateandlocal.html (last visited Jan. 23, 2006).

> The EEOC and the FEPAs it works with have reached Worksharing Agreements that divide up their common workload of charges in order to avoid duplication of charge processing. Each charge of discrimination that is covered by both an EEOC-enforced statute and the FEPAs law or ordinance is dual-filed under both laws, regardless of which agency receives it. These dual-filed charges are typically investigated by only one agency. This way, employers avoid investigations of the same matter, but the legal rights of the charging parties are still preserved under both laws.

Id. Moreover, the EEOC states that:

> [t]his effort prevents duplication of effort, coordinates enforcement activities, streamlines the charge resolution process for both charging parties and respondents, consistently applies enforcement practices, and conserves limited government resources. . . .
>
> In addition, [the EEOC] provide[s] training on investigative and legal issues and conduct[s] joint activities [with the FEPAs] to benefit our

> mutual constituencies, such as outreach to provide education and technical assistance.

U.S. Equal Employment Opportunity Commission, *Equal Employment Opportunity Commission Annual Performance Report Fiscal Year 2001, Strategic Objective 1.3*, http://www.eeoc.gov/abouteeoc/plan/apr2001/apr2001-4.html (submitted to the President and Congress March 2002) (last visited Jan. 23, 2006).

In this case, the EEOC and the FCHRC entered into a worksharing agreement, in recognition of the "common jurisdiction and goals of the two Agencies." (Pet. App. 56a, § I.B). Under the worksharing agreement, "the EEOC and the [FCHRC] each designate the other as its agent for the purpose of receiving and drafting charges," and "the date of receipt by either Agency will be deemed to be the date of receipt for the other Agency." (Pet. App. 56a, § II.A). The agreement sets forth provisions relating to how charges will be filed, the division of initial charge-processing responsibilities, and the use and exchange of information between the EEOC and the FCHRC. (Pet. App. 56a-65a, §§ II-V). From this statutory and contractual scheme, it is obvious that the EEOC and the FCHRC work in concert; for as the EEOC itself has stated, "[t]he FEPA's enforcement efforts must be viewed as an *integral component* of the Commission's enforcement efforts." U.S. Equal Employment Opportunity Commission, *U.S. Equal Employment Opportunity Commission National Enforcement Plan, VII. Enforcement Partnership with State and Local Fair Employment Agencies*, http://www.eeoc.gov/abouteeoc/plan/nep.html (last visited Jan. 23, 2006) (emphasis added).

For example, while the deferral period gives FEPAs first crack at a charge, the EEOC is involved from the start. Under the worksharing agreement, when a charge is dual-filed, the agency initially processing the charge will seek to transmit the charge electronically to the other within two days, sending a hard copy within ten days. (Pet. App. 57a, § II.E). Additionally, the FCHRC has waived its right to exclusive jurisdiction to initially process certain charges, allowing the EEOC to proceed immediately without waiting until the 61st day. (Pet. App. 60a-62a, § III.B).

Moreover, the worksharing agreement is an agreement by which the EEOC and the FCHRC utilize resources towards the prosecution of discrimination charges concurrently regulated by the two agencies. The FCHRC is contracting with the EEOC to "process all Title VII, ADA, and ADEA charges over which it has jurisdiction, whether or not the Charging Party first contacts the [FCHRC] or the EEOC," with the exception of a select few, which the EEOC will initially process. (Pet. App. 59a, § III.A). Furthermore, the exchange of information provision explicitly demonstrates the close relationship between the two agencies:

> Both the FEPA and the EEOC shall make available for inspection and copying to appropriate officials from the other Agency any information that may assist each Agency in carrying out its responsibilities. Such information shall include, but not necessarily be limited to, investigative files, conciliation agreements, staffing information, case

> management printouts, charge processing documentation, and any other material and data as may be related to the processing of dual-filed charges or administration of the contract.
>
> . . . .
>
> In order to expedite the resolution of charges or facilitate the working of this Agreement, either Agency may request or permit personnel of the other Agency to accompany or to observe its personnel when processing a charge.

(Pet. App. 64a-65a, § V.A, .C).

Additionally, decisions by FEPAs carry great weight with the EEOC in any subsequent review. For all designated FEPAs, a decision will be accorded substantial weight by the EEOC in any review it conducts. *See* 29 C.F.R. § 1601.75(a); *see generally* 29 C.F.R. § 1601.74(a) (listing all 122 designated FEPAs). Moreover, for a certified FEPA, such as the FCHRC, "the Commission shall accept the findings and resolutions of designated FEP agencies in regard to cases under contracts with those agencies without individual, case-by-case substantial weight review by the Commission" except under certain limited circumstances. 29 C.F.R. § 1601.75(a); *see generally* 29 C.F.R. § 1601.80 (listing all 82 certified designated FEPAs).

As stated, the EEOC must defer to FEPAs for 60 days. *See* 42 U.S.C. § 2000e-5(c). However, "[a]fter the expiration of the exclusive processing period, the

[EEOC] may commence processing the allegations of discrimination." 29 C.F.R. § 1601.13(a)(3)(ii).[5] The EEOC did not commence processing Ms. Simms' charge after the expiration of the 60 days, but instead chose to let it languish with the FCHRC. The charge, however, was considered filed and pending before the EEOC.[6]

From the date of filing on, the EEOC and/or the FCHRC were responsible for the clearly unreasonable delay. The charge sat before the FCHRC for almost four years. The EEOC did nothing. Furthermore, from March 24, 1999 on, the EEOC was the sole agency before which Ms. Simms' charge was filed, since on that date the FCHRC lost jurisdiction. Again, the EEOC did nothing. Based on the worksharing agreement, the EEOC could have reviewed the files of the FCHRC's

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[5] The *Notice of Charge of Discrimination* sent by the EEOC to Navy Federal on March 31, 1997, provides:

> While EEOC has jurisdiction (upon the expiration of any deferral requirement if this is a Title VII or ADA charge) to investigate this charge, EEOC may refrain from beginning an investigation and await the issuance of the Agency's final findings and orders. These final findings and orders will be given weight by EEOC in making its own determination as to whether or not reasonable cause exists to believe that the allegations made in the charge are true.

(C.A. J.A. 241).

[6] Indeed, even if the EEOC chooses not to take any action on the charge, the charge is legally pending before it and filed for purposes of satisfying the 300-day time limit under 42 U.S.C. § 2000e-5(e)(1). Furthermore, it is the date of filing which courts look at in applying a laches defense. *See, e.g., EEOC v. Massey-Ferguson, Inc.*, 622 F.2d 271, 277 (7th Cir. 1980).

investigation, verified the status of the case, or requested to be assigned processing of the charge. (Pet. App. 56a-57a, 64a-65a, §§ II.C, V.A, .C).[7] Furthermore, the worksharing agreement specifically delineates a liaison official for each agency for the other to contact concerning the day-to-day implementation of the agreement. (Pet. App. 68a, § VIII.A).

The only other case prior to the Fourth Circuit's decision that addressed delay by a FEPA held that its delay could be imputed to the EEOC for purposes of laches. Specifically, in *EEOC v. Phillips Colleges, Inc.*, 984 F. Supp. 1464 (M.D. Fla. 1997), the district court concluded there had been "inexcusable delay" based on both delays by two state FEPAs and the EEOC. *Id.* at 1468. The facts in this case are similar. The EEOC and the FCHRC work in tandem, as agents for each other and partners in the processing of discrimination charges.

B. The Court of Appeals' Determination Prejudices Navy Federal and Potentially All Defendants in Actions Brought By the EEOC Post-FEPA Investigation

The Fourth Circuit's determination that the delay of the FCHRC cannot be imputed to the EEOC will have a profound effect on defendants in discrimination actions being brought by the EEOC post-FEPA investigation. The decision permits the

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[7] The worksharing agreement provides that "[c]harges may be transferred between the EEOC and the FEPA only by mutual agreement." (Pet. App. 56a-57a, § II.C).

EEOC to willingly sign-away its statutory duties under a worksharing agreement and then maintain that it is not accountable for any "sharing" at all. The Fourth Circuit's decision would permit a FEPA to sit on a charge indefinitely with no repercussions—for four years, as in this case, or much longer—so long as it was the EEOC that finally brought suit. Similar unreasonable delays have consistently been held to forestall relief and rise to the level of action permitting a laches defense. *See EEOC v. Dresser Indus., Inc.*, 668 F.2d 1199, 1202 (11th Cir. 1982) (68-month delay unreasonable); *EEOC v. Alioto Fish Co.*, 623 F.2d 86, 88 (9th Cir. 1980) (62-month delay unreasonable); *Massey-Ferguson, Inc.*, 622 F.2d at 278 (delay of four years, nine months unreasonable). This case is no different. Whether viewing the actions of the EEOC and/or the FCHRC, these partners failed to act in a manner and within a period of time that was reasonable after the filing of Ms. Simms' charge. The EEOC's actions are even more egregious given the fact that by the time it took responsibility for the FCHRC's file, it created a new claimant—Ms. Santos—for whom suit was filed, even though Navy Federal had no clue as to her claims until the EEOC got hold of the FCHRC's state file.

C. The Court of Appeals' Decision Has Far Reaching Effects Because of the Number of Cases Deferred to FEPAs

Tens of thousands of charges are dual-filed with FEPAs and the EEOC each year, and the EEOC, through contractual agreements with FEPAs, looks to the FEPAs to process these charges. For example, according to the EEOC itself, in FY (fiscal year) 2005,

the EEOC contracted with 94 FEPAs to handle 55,928 dual-filed charges received during the course of the year, with FEPAs resolving 54,530 dual-filed charges during this same period. *See* U.S. Equal Employment Opportunity Commission, *Performance and Accountability Report FY 2005*, at 7 (Nov. 15, 2005), *available at* http://www.eeoc.gov/abouteeoc/plan/par/2005/par2005.pdf; *see generally* U.S. Equal Employment Opportunity Commission Washington Field Office Web Site, *State and Local Agencies*, http://www.eeoc.gov/washington/fepa.html (last visited Jan. 23, 2006) (stating that nationally, "[t]he EEOC contracts with approximately 90 FEPAs nationwide to process more than 48,000 discrimination charges annually"). Due to the number of charges that the EEOC contracts out to FEPAs for handling, a decision permitting the EEOC to avoid a laches defense based on the dilatory actions of any given FEPA has great prejudicial consequences for employers facing a possible suit by the EEOC post-initial FEPA investigation and enforcement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted in order that this Court may review the judgment of the United States Court of Appeals for the Fourth Circuit and, ultimately, to vacate the judgment below.

Respectfully submitted,

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No. 04-2058

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

NAVY FEDERAL CREDIT UNION,
Defendant-Appellee.

March 17, 2005, Argued

September 13, 2005, Decided

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JUDGES: Before KING and GREGORY, Circuit Judges, and HAMILTON, Senior Circuit Judge. Judge King wrote the opinion, in which Judge Gregory and Senior Judge Hamilton joined.

OPINION BY: KING

OPINION: KING, Circuit Judge:

The Equal Employment Opportunity Commission (the "EEOC") appeals from the district court's judgment in favor of Navy Federal Credit Union ("Navy Federal") on the EEOC's Title VII retaliation claim concerning Donna Santos, a former Navy Federal supervisor. In its complaint in the Eastern District of Virginia (the "Complaint"), the EEOC alleged that Navy Federal had illegally discharged Santos for opposing what she reasonably believed to be the unlawful treatment of one of her subordinates, Tammy Simms. Following extensive discovery proceedings, the district court awarded summary judgment to Navy Federal, concluding that the EEOC's evidence of retaliation was insufficient and that its claim was also barred by laches. *See EEOC v. Navy Fed. Credit Union*, No. CA-03-543-1 (E.D. Va. June 18, 2004) (the "Opinion"). As explained below, we vacate and remand.

I.

A.

Navy Federal, a credit union serving employees of the Department of the Navy and their families, is headquartered in Vienna, Virginia.[1] In April 1995, Donna Santos began working as a supervisor in Navy Federal's Staffing Section, a position entailing her oversight of four subordinates.[2] During her three-month probationary period, Santos received positive performance appraisals, and, in January 1996, she was recognized in an internally circulated e-mail message for "a wonderful idea to help us enhance software support." J.A. 40.[3]

In March 1996, however, representatives of Navy Federal's Employee Relations Section received complaints from three of Santos's subordinates about her performance, including that she was incompetent and error-prone, and that there was a lack of communication, training, and leadership in the Staffing Section. These three employees (including Tammy Simms) also complained that Santos had failed to intervene in issues involving Dianne Snably (the fourth Santos subordinate), and that Santos and Snably seemed to have "teamed" against them. J.A. 77-81. They reported their complaints to the Employee Relations Section on March 7, 14, and 15, 1996.

Notwithstanding these complaints, Santos, on March 24, 1996, received a merit salary increase, and, on April 9, 1996, she received an annual performance appraisal rating her as "highly successful" or "successful" in all scored categories.[4] In this appraisal, Santos was complimented for, *inter alia*, "learning to address and resolve conflicts among the staff immediately instead of allowing them to fester"; being "intricately involved in motivating the staff"; "delegating effectively and

assigning the workflow so that deadlines and objectives are met"; "dealing equitably with the group"; and "continuing to improve her organizational and planning skills." J.A. 57. It was also recognized that "the Staffing Section continues to improve their team work under [Santos's] direction." *Id.*

After April 1996, assessments of Santos's performance became less laudatory. On July 29, 1996, Santos's immediate supervisor, Jan Herman, met with Santos to discuss three specific issues -- failure to post a job vacancy announcement, telephone usage, and coverage of the Staffing Section during lunch. J.A. 86. Then, on August 23, 1996, Herman documented Santos's performance for the month, observing that she needed improvement in the areas of leadership and controlling operations. In support of this assessment, Herman noted the following: Santos was absent from work on the day her Section distributed an important booklet, leaving no one to address problems relating thereto; she attended a computer software class when her Section was already short-staffed; on two occasions, significant mistakes were found in paperwork that had been approved by a subordinate to whom Santos had delegated that responsibility; on three occasions, Staffing Section employees were observed being idle; and some of Santos's subordinates were regularly five to ten minutes late to work in the morning, took overly long breaks and lunches, closed their work stations early, and made excessive personal phone calls. Herman concluded that Santos "needs to pay attention to her staff, what is getting done, and ensuring that the [Staffing] Section is running smoothly and according to policy at all times." J.A. 87. Herman also remarked that Santos "is more interested in her own training and

development in PC applications than in her job as [a Navy Federal] supervisor." *Id.* At the time of these observations, Herman considered conducting a "special review" of Santos (which presumably would have involved a more formal performance appraisal and constituted a more grievous mark on Santos's employment record). By early September 1996, however, Herman had decided against such a review, because Santos had improved her job performance. J.A. 96.

B.

In 1995, Tammy Simms was promoted by Navy Federal to a position in the Staffing Section, which placed her under Santos's supervision. Over time, Santos criticized Simms's performance in various respects, but complimented it in others. Simms perceived Santos's criticism of her as unfair and complained that Santos overburdened her with an inequitable workload. Other Staffing Section employees, however, believed that Santos sometimes gave special treatment to Simms by, among other things, excusing Simms from physical tasks because of a difficult pregnancy, and adjusting her work schedule to accommodate transportation-related limitations.

Simms was one of the three Santos subordinates who complained in March 1996 about Santos's lack of effective leadership, including her failure to rein in their co-worker Snably. The record reveals that Snably was at times uncivil -- and worse -- to all of her co-workers, but perhaps especially to those who were African-American women, including Simms and Barbara Stephens.[5] Simms reported to Santos on March

12, 1996, and then to the Employee Relations Section on March 14, 1996, that she believed Snably was hiding her paperwork "to set her up" and had done the same to Stephens. J.A. 79, 500-01. Although Santos expressed her dissatisfaction with Snably to Simms, Simms concluded that Santos was an ineffective supervisor and was thereafter unwilling to go to Santos about problems with Snably. Simms also came to suspect that Santos and others were prejudiced against Simms.

In late August through early September 1996, a series of meetings were held among, in various configurations, Simms, Santos, Snably, Herman, and representatives of the Employee Relations Section. During these meetings, the participants discussed both positive and negative aspects of Simms's performance, her ongoing complaints about Santos and Snably, and Simms's concerns about possible racial discrimination against her and Stephens. These meetings failed to resolve the tensions in the Staffing Section or convince Simms that she was being treated fairly.

C.

On September 16, 1996, Simms filed an internal "Request for Resolution Form," with the Employment Relations Section. In it she alleged race, color, sex, and age discrimination, and detailed numerous instances of alleged unfair treatment by Santos, Snably, and others. J.A. 499-510. Shortly thereafter, according to Santos and the EEOC, Navy Federal devised a plan to terminate Simms in retaliation for her discrimination complaint, and to cover up its reasons for the discharge in order to protect itself from liability in subsequent litigation. The EEOC maintains that Santos opposed

this retaliation scheme -- a position that resulted in her suspension and, ultimately, her discharge from Navy Federal.

By the time Simms lodged her internal complaint, Herman had considered conducting a "special review" of Santos, but decided against it in view of Santos's improved performance. Between the time that Simms filed her complaint and the time that Santos learned of Navy Federal's retaliation scheme, aspects of Santos's performance were assessed on two occasions. On September 19, 1996, Herman observed a problem with Santos and Simms taking a lunch break at the same time, prompting her to warn Santos not to make it a continuing practice. On a more positive note, Personnel Director Ellen Yarborough sent a handwritten note to Santos on October 4, 1996, thanking her for her "hard work in developing a new application for the annual financial plan [and] for completing all the personnel budget requirements." J.A. 41. Yarborough remarked: "We appreciate your dedication to getting it done. Great job!" *Id.* Santos asserts that she received Yarborough's note, along with a cash bonus, as part of the "Directors award" given to one employee annually in the Human Resources Division for outstanding contributions to the Division. J. A. 122.

According to Santos, she shortly thereafter learned of Navy Federal's scheme to retaliate against Simms. The scheme was two-fold: (1) to give Simms favorable performance evaluations, which could be used to defend Navy Federal's actions in subsequent litigation; and (2) to heighten scrutiny of Simms's activity in order to discover an objective and seemingly legitimate basis for her termination.

On October 9, 1996, a meeting was held with Santos, Herman, and two representatives of the Employee Relations Section, including the head of that Section, Angela Culbertson. Culbertson was angry about Simms's allegations of discrimination and declared that she would "get Tammy [Simms] on principle." J.A. 118. Culbertson instructed Santos to heighten surveillance of Simms's work habits, including compiling accuracy reports and documenting the quantity of work that Simms produced. J.A. 216. Santos knew that the oversight responsibilities would fall primarily to Snably, the subject of many of Simms's complaints. She objected to the plan because she felt that it would be unfair to Simms. J.A. 118. Santos proposed that she oversee Simms's work instead, but Culbertson rejected her plan. J.A. 121.

Shortly thereafter Santos participated in a conference call between Culbertson and Navy Federal's outside counsel. While discussing Simms's discrimination complaint, the attorney for Navy Federal suggested that Culbertson "just fire the bitch." J.A. 118. The attorney also warned Culbertson that any negative evaluations of Simms's performance could be perceived as retaliatory. J.A. 120. Santos was then asked whether Simms was likely to file a retaliation claim if she was terminated. When Santos responded affirmatively, she was asked to leave the meeting. Santos later learned that Culbertson had decided to give Simms favorable performance assessments while efforts were made to discover an objective basis for terminating Simms, such as payroll fraud. J.A. 216.

The week before October 25, 1996, Santos was determined to be "well qualified" for a promotion in the

Human Resources Division. J.A. 118. Nevertheless, on October 25, Santos received a "special review," which covered the period from May 15, 1996, to October 15, 1996. This review downgraded Santos's performance appraisal in numerous areas relating to her supervisory and management duties. J.A. 60-66.[6] In conjunction with the review, Santos was placed on probation for 180 days, through approximately April 25, 1997. She retained her usual supervisory responsibilities during that period.

In November 1996, Santos prepared several proposed evaluations of Simms's performance, all of which concluded that Simms's performance needed improvement. Culbertson rejected each of these assessments because they were too negative, and she eventually took it upon herself to prepare a substantially more positive evaluation that rated Simms "successful" or "highly successful" in all scored categories. J.A. 121, 495-98. When asked by Herman to sign Culertson's evaluation of Simms, Santos refused to do so, being unwilling to endorse an evaluation she believed to be fabricated. Herman strongly urged Santos to sign the evaluation and warned her that if she failed to do so her "probationary period would not go well for [her]" and that she was "doing [herself] in." J.A. 121. Santos nevertheless refused to sign the evaluation, prompting Herman to endorse it instead.

On January 4, 1997, Herman called Santos into her office and advised her to begin looking for a different job. Although Navy Federal's usual "special review" policy was to place the targeted individual on probation for 180 days and offer suggestions for improvement during that period, Herman advised Santos that there

was "nothing [she was] going to be able to do to change things." J.A. 117. On February 6, 1997, Herman prepared a "special review" of Santos for the period from October 15, 1996 to February 6, 1997, further downgrading her scores and recommending termination for an "inability to improve performance of supervisory responsibilities to a successful level." J.A. 71. On February 14, 1997, Santos was terminated.

II.

On March 25, 1997, Simms resigned from Navy Federal and filed a discrimination complaint against it in the Fairfax County Human Rights Commission (the "FCHRC"). Two days later, on March 27, 1997, Simms's complaint was cross-filed with the EEOC, pursuant to a worksharing agreement between the FCHRC and the EEOC (the "Worksharing Agreement"). On May 15, 1997, Navy Federal initially responded to Simms's complaint in the FCHRC. In its response and subsequent correspondence, Navy Federal disputed Simms's charge of discrimination on several grounds, including that she had received a "successful" performance appraisal from Herman in January 1997. The FCHRC actively investigated Simms's charge until October 28, 1997, when Navy Federal declined to make a settlement offer to Simms. Thereafter, the FCHRC investigator assigned to the Simms case essentially ignored it while dealing with personal issues, only corresponding with Navy Federal in March 1999 with requests to interview several of its employees. Finally, the FCHRC assigned a new investigator to the Simms case in the fall of 2000.

On February 6, 2001, the FCHRC issued a ruling on Simms's discrimination complaint, finding sufficient evidence of retaliation, but insufficient evidence of race or national origin discrimination. Subsequently, on March 1, 2001, the FCHRC referred the Simms case to the EEOC to ascertain whether it wished to issue a cause finding, noting that the FCHRC had lost jurisdiction, as of March 24, 1999, to conduct a public hearing on Simms's complaint. Four months later, on July 6, 2001, the EEOC issued its own determination, agreeing with the FCHRC's conclusions and additionally finding reasonable cause to believe that "Simms's supervisor" (later identified as Santos) was the victim of retaliation.[7]

Settlement negotiations then commenced between the EEOC (acting on behalf of Simms and Santos) and Navy Federal. Eventually, Simms requested a right-to-sue letter so that she could pursue a federal court action on her own.[8] Meanwhile, settlement negotiations continued between the EEOC (now acting on behalf of Santos only) and Navy Federal. The last of those negotiations occurred between September and November of 2002. Finally, on April 28, 2003, the EEOC initiated this proceeding on Santos's behalf in the Eastern District of Virginia. In its Complaint, the EEOC alleged that Navy Federal had retaliated against Santos in contravention of section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a).

On June 13, 2003, Navy Federal sought summary judgment on laches grounds, which the court denied on July 11, 2003. On December 5, 2003, following discovery, Navy Federal renewed its motion, asserting the following: (1) that EEOC's evidence of retaliation

was insufficient; and (2) that the EEOC's claim was barred by laches. By its Opinion of June 18, 2004, the district court granted summary judgment to Navy Federal both on the merits and on the grounds that laches barred the EEOC's claim. Opinion at 2. The EEOC has filed a timely notice of appeal, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

III.

We review de novo an award of summary judgment, viewing the facts and inferences drawn therefrom in the light most favorable to the non-moving party. *See Seabulk Offshore, Ltd. v. Am. Home Assurance Co.*, 377 F.3d 408, 418 (4th Cir. 2004). Such an award "is appropriate only 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, . . . show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(c)) (alteration in original).

Because the equitable balancing required in a laches determination is committed to the discretion of the district court, we may reverse such a ruling only if such discretion was abused. *See White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990). By definition, a court "abuses its discretion when it makes an error of law." *United States v. Ebersole*, 411 F.3d 517, 526-27 (4th Cir. 2005) (internal quotation marks omitted).

IV.

By this appeal the EEOC makes two contentions: (1) that the district court erred in ruling that the EEOC

failed to present sufficient evidence of retaliation; and (2) that the court abused its discretion in ruling that laches barred the EEOC's claim on behalf of Santos. We assess each of these contentions in turn.

A.

In assessing the EEOC's retaliation claims, we are obliged to begin with the language of the relevant statutory provisions. In pertinent part, section 704(a) of Title VII prohibits an employer from taking an adverse employment action against any employee "because he has opposed any practice made an unlawful employment practice under this subchapter." Title VII § 704(a), 42 U.S.C. § 2000e-3(a). Under the burden-shifting framework first formulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), a plaintiff bears the initial burden of establishing a prima facie case of retaliation. *See Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 258 (4th Cir. 1998) (citing *McDonnell Douglas*, 411 U.S. at 802-04). Once this burden is carried, the burden shifts to the defendant, who is obliged to articulate a legitimate, non-retaliatory justification for the adverse employment action. *See id.* If the defendant carries this burden, the onus is on the plaintiff to then demonstrate that the non-retaliatory reason advanced by the defendant is a mere pretext. *See id.*; *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000).

By its Opinion, the district court concluded that the EEOC had failed to establish a prima facie case of retaliation against Navy Federal, and that the EEOC

had failed to demonstrate that the non-retaliatory reason advanced by Navy Federal was a pretext. Opinion at 7-10. As explained below, we are unable to agree with these conclusions.

1.

In order to establish a prima facie case of retaliation, a plaintiff must prove three elements: (1) that she engaged in a protected activity; (2) that her employer took an adverse employment action against her; and (3) that there was a causal link between the two events. *See Von Gunten v. Maryland*, 243 F.3d 858, 863 (4th Cir. 2001) (citing *Beall v. Abbott Labs.*, 130 F.3d 614, 619 (4th Cir. 1997)). Only the first element of this test is at issue here. The district court concluded that the EEOC had failed to establish that Santos had engaged in a protected activity. The court reached this result for two reasons: (a) because Santos had not "opposed" any action taken by Navy Federal; and (b) because Santos had no reasonable basis for believing that any action taken by Navy Federal was unlawful. Opinion at 6-9.

a.

Under the applicable legal principles, in the context of a retaliation claim, a "protected activity" may fall into two categories, opposition and participation. Only one of these categories -- opposition -- is relevant here. *See Laughlin*, 149 F.3d at 259 (citing 42 U.S.C. § 2000e-3(a)). As we have recognized, protected oppositional activities may include "staging informal protests and voicing one's own opinions in order to bring attention to an employer's discriminatory activities," *id.*, as well as "complaints . . . about suspected violations," *Bryant v.*

Aiken Reg'l Med. Ctrs., Inc., 333 F.3d 536, 543-44 (4th Cir. 2003).

In concluding that Santos did not oppose any of Navy Federal's actions toward Simms, the district court emphasized that Santos was one of the primary objects of Simms's internal discrimination complaint. Opinion at 7. But the unlawful activity that Santos claims to have opposed was not the discrimination alleged by Simms, but rather Navy Federal's acts of retaliation against Simms for complaining of discrimination. According to Santos, Navy Federal intended to terminate Simms in retaliation for her allegations of discrimination, and to cover up its improper reasons for her termination with ostensibly objective grounds. The evidence reveals that Santos opposed this scheme. Specifically, when Culbertson gave primary supervisory authority over Simms to Snably, Santos objected, believing the transfer of authority from her to Snably to be a component of Navy Federal's improper retaliatory scheme. More importantly, when Santos was asked to sign what she believed to be a misleading but favorable evaluation of Simms's work, Santos refused to do so because of her understanding that Navy Federal intended to use the evaluation to defend itself from future litigation by Simms.[9] This evidence, showing that Santos objected to Snably's supervision of Simms and that she refused to approve the misleading evaluation of Simms's performance, precluded a ruling in favor of Navy Federal on the question of opposition.

b.

The district court further concluded, however, that even if Santos had opposed actions taken by Navy

Federal, she could not have reasonably believed that those actions were in violation of Title VII. Opinion at 7. We have recognized that section 704(a) protects activity in opposition not only to employment actions actually unlawful under Title VII but also employment actions an employee reasonably believes to be unlawful. *See United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 367 F.3d 245, 255 (4th Cir. 2004), *vacated on other grounds*, 162 L. Ed. 2d 390, 125 S. Ct. 2444 (2005); *see also Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992). In its ruling, the district court reasoned that the increased surveillance and scrutiny of Simms's work habits were merely "administrative actions" that could not reasonably be adverse employment actions. Opinion at 8. It further held that Santos could not reasonably have believed that Navy Federal's efforts to evaluate Simms more favorably than she deserved were adverse to Simms because favorable treatment is "by definition" not adverse. *Id.*

Unfortunately, the district court's analysis on this point took too narrow a view of Navy Federal's actions relating to Simms. Assessing the evidence of Navy Federal's actions towards Simms as a whole, Santos held a reasonable belief that Navy Federal was unlawfully retaliating against Simms. The series of relevant events, recounted by Santos in her testimony before the FCHRC and in her deposition here, shows that her superiors at Navy Federal set in motion a plan to terminate Simms in retaliation for her complaints of racial discrimination, while at the same time seeking to conceal their improper motives under the guise of objective criteria.

Shortly after Simms filed her discrimination complaint, Santos attended a meeting where Culbertson became angry and asserted that she would "get Tammy [Simms] on principle." Shortly thereafter Santos participated in the conference call where Navy Federal's lawyer suggested that they "just fire the bitch." During this conference call, the attorney also advised Culbertson that any unfavorable evaluations of Simms's performance could potentially support a retaliation claim by Simms. Culbertson and others at Navy Federal then developed a plan under which Simms would receive favorable evaluations while her actions were scrutinized to discover an objective basis for her discharge, such as payroll fraud, which would insulate Navy Federal from civil liability. Navy Federal was not, in this context, doing Simms a favor by positively assessing her job performance. The heightened scrutiny and favorable evaluations were thus part and parcel of its larger plan to fire Simms for unlawful reasons and to cover up those reasons with pretextual charges. When Santos objected to the added surveillance and refused to sign the misleading evaluation of Simms, she therefore reasonably believed that she was opposing unlawful retaliation. In these circumstances, the EEOC has presented evidence sufficient to establish a prima facie case of unlawful retaliation against Santos.

2.

As explained above, when a plaintiff has established a prima facie case of retaliation, the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for the adverse employment action. *See Reeves*, 530 U.S. at 143; *Laughlin*, 149 F.3d at 258 (citing

McDonnell Douglas, 411 U.S. at 802-04). If the defendant carries this burden, the presumption of retaliation falls, and the plaintiff bears the ultimate burden of proving that the defendant's non-retaliatory reason for the adverse employment action was pretextual. *See id.*[10]

In ruling in favor of Navy Federal on the pretext issue, the district court concluded that the EEOC had "presented no evidence to directly rebut Defendant's evidence that Santos's supervisory skills were deficient." Opinion at 10. Navy Federal did present evidence that, despite Santos's technical skills, she was not considered a capable supervisor. During March 1996, three of Santos's subordinates complained of problems within Santos's Section. Indeed, one complained that there was a lack of communication, training, and leadership in the Staffing Section. Another complained that she was receiving inadequate training and that Santos had lost control of her Section. In July 1996, Herman, Santos's supervisor, met with her to discuss various performance issues, and in August 1996, Herman documented that Santos needed improvement in the areas of leadership and controlling operations.

The summary judgment record, however, also contains evidence demonstrating that Santos's supervisors were pleased with her overall job performance and that her opposition to the plan to terminate Simms was the actual basis for her discharge. In April 1996, shortly after her subordinates complained of her incompetence and lack of supervisory skills, Santos received a positive annual performance appraisal, which praised, *inter alia*, her achievements in resolving interpersonal

conflicts in her Section, motivating her staff, and "dealing equitably with the group." Although by September 1996 Herman had registered complaints about certain aspects of Santos's performance, Herman decided against a "special review" because she believed that Santos's performance had improved. Furthermore, in October 1996, Navy Federal presented Santos with the Human Resources Division's "Directors award," an annual honor accompanied by a cash bonus, and given in recognition of outstanding contributions to the Division.[11] Finally, even after Santos opposed Navy Federal's retaliation scheme against Simms, Santos was deemed "well qualified" for a promotion.

Not only is the evidence in conflict regarding Santos's job performance, but the EEOC also presented evidence from which a jury could readily infer that the actual reason for her discharge by Navy Federal was her opposition to its treatment of Simms.[12] The record reveals that, just after Santos expressed opposition to Navy Federal's scheme to retaliate against Simms, Santos was given a "special review," which was significantly harsher than her previous evaluation of April 9, 1996. At the same time, Santos was also placed on probation. In regard to the misleading Simms evaluation, Culbertson repeatedly rejected as overly negative Santos's efforts to fairly assess Simms's performance before completing the Simms evaluation herself. Santos's refusal to approve Culbertson's misleading evaluation of Simms was met sternly by Herman, who warned Santos that she was "doing herself in." Shortly thereafter, Herman advised Santos that she should be searching for new employment. When Santos asked what steps she could take to avoid termination, Herman responded that there was nothing

she could do, despite the fact that Navy Federal's general probation policy was to offer suggestions for improvement to probationary employees such as Santos. Whatever Santos's skills as a supervisor, the evidence, viewed in the proper light, warrants the inference that Santos was fired because of her opposition to what she reasonably perceived to be a concerted effort by Navy Federal to terminate Simms for unlawful reasons.[13] As a result, the district court's ruling in favor of Navy Federal on the pretext issue was erroneous.

B.

As an alternative ground for its summary judgment award to Navy Federal, the district court concluded that the doctrine of laches bars the EEOC's claim. In so ruling, it based its decision wholly on the delay by the FCHRC while the matter was pending in Fairfax County. Opinion at 11-12. Under our precedent, the equitable defense of laches requires a defendant to prove "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990) (internal quotation marks omitted). The first element of laches, lack of diligence, is satisfied where a plaintiff has unreasonably delayed in pursuing his claim. *See id.* On this point, the court observed that, because the FCHRC had proceeded so slowly, the EEOC "was unable to adopt the FCHRC's findings and move forward until July 2001," over four years after Simms filed her initial complaint. Opinion at 12. The "unreasonable delay" identified by the court was the failure of the FCHRC to timely investigate Simms's claim. The court thus attributed to the *EEOC* the delay

caused by the *FCHRC* in concluding that laches bars the claim asserted in the EEOC's Complaint.[14] As explained below, the court erred in imputing the actions of the FCHRC to the EEOC.

In support of the district court's ruling on this issue, Navy Federal maintains that an agency relationship exists between the EEOC and the FCHRC. Based on our analysis of the pertinent statutory provisions, however, the two agencies operate with substantial independence. Title VII's provisions regarding "FEP" or "deferral" agencies such as the FCHRC,[15] including sections 706(c)-(e) and 709(b)-(d). *See* 42 U.S.C. §§ 2000e-5(c) to (e), §§ 2000e-8(b) to (d) . These provisions are best understood as creating a system of "cooperative federalism," under which, in the interests of comity, the EEOC and state and local authorities share primary responsibility to enforce the civil rights laws. *See, e.g.*, Phillip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. Rev. 663, 671 (2001) ("Real authority under [cooperative federalism] regimes often rests with the states which ultimately exercise considerable discretion in making and implementing policy."). Sections 709(c) and (d) of Title VII, for example, grant deferral agencies exclusive jurisdiction for at least sixty days to act upon charges arising within their respective jurisdictions. 42 U.S.C. § 2000e-5(c) to (d). The courts have interpreted those provisions as being designed to provide the deferral agencies with the opportunity to resolve discrimination claims without federal intervention. *See EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 110-11, 100 L. Ed. 2d 96, 108 S. Ct. 1666 (1988) (citing both Supreme Court decisions and Title VII's legislative history in support

of this proposition); *Puryear v. County of Roanoke*, 214 F.3d 514, 517 (4th Cir. 2000) ("The purpose of the presumptive sixty-day deferral period is comity -- to provide states and localities the first opportunity to combat discrimination, free from premature federal intervention."); *see also Love v. Pullman Co.*, 404 U.S. 522, 526, 30 L. Ed. 2d 679, 92 S. Ct. 616 (1972)). These understandings rest on the premise that deferral agencies such as the FCHRC enjoy a substantial degree of autonomy and discretion.

In further support of its contention that the EEOC and the FCHRC enjoy an agency relationship, Navy Federal relies on section II.A of the Worksharing Agreement, under which each agency designates the other as its agent "for the purpose of receiving and drafting charges." Yet, the Worksharing Agreement, when viewed as a whole, is consistent with our assessment of the statutory framework for the relationship between the EEOC and the FCHRC. The overall thrust of the Worksharing Agreement, as its title suggests, is to divide the workload on proceedings over which the two agencies possess common jurisdiction. Section III.A.1 of the Worksharing Agreement lists those matters that the EEOC is required to initially process, while section III.A.2 lists those committed to the authority of the FCHRC. The independence that the two agencies retain to process and investigate their own charges is made evident by section II.C of the Agreement, which provides that "normally, once an Agency begins an investigation, it resolves the charge." Indeed, the designation of each agency as an agent of the other for the purpose of receiving and drafting charges is simply a matter of convenience for the charging party. Under section II.A,

the receipt by either agency of a charge automatically initiates the proceeding for the purposes of Title VII's timing provisions, and the charges are freely transferred between the two agencies. The Worksharing Agreement, therefore, does not alter the fact that the EEOC and the FCHRC operate with substantial independence and autonomy.[16]

The autonomy enjoyed by the EEOC and the FCHRC controls our assessment of the laches issue. The doctrine of laches requires that a party demonstrate a "lack of diligence *by the party against whom the defense is asserted.*" *White*, 909 F.2d at 102 (emphasis added) (internal quotation marks omitted). Absent a showing that the delaying entity is the agent or alter ego of the party against whom laches is asserted, we are unable to penalize the latter (the EEOC) for the actions of the former (the FCHRC). By attributing the FCHRC's delay to the EEOC for laches purposes, the district court made a legal error, constituting an abuse of discretion. *See Ebersole*, 411 F.3d at 526-27.[17]

V.

Pursuant to the foregoing, we vacate the judgment in favor of Navy Federal and remand for such further proceedings as may be appropriate.

VACATED AND REMANDED

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 Because this appeal is from an award of summary judgment to Navy Federal, we are obliged to present and assess the relevant facts in the light most favorable

to the EEOC, the non-moving party. *See Seabulk Offshore, Ltd. v. Am. Home Assurance Co.*, 377 F.3d 408, 418 (4th Cir. 2004). However, because it is relevant to our analysis under the *McDonnell Douglas* burden-shifting framework, *see* Part IV.A, we also set forth evidence regarding Ms. Santos's supervisory skills that is favorable to Navy Federal.

n2 According to the EEOC, Santos is now known as "Moira Flanagan." However, we refer to her as "Donna Santos," or simply "Santos," as did the district court.

n3 Citations to "J.A. " refer to the contents of the Joint Appendix filed by the parties in this proceeding.

n4 The April 9, 1996 performance appraisal of Santos reflects that it was prepared on March 14, 1996. In this appraisal, Santos was scored in the following categories: job knowledge; productivity; accuracy; dependability on the job; work methods; problem solving; interpersonal skills; communication skills; work habits; attendance; leadership; organizing and planning; controlling operations; employee relations; employee recognition and development; and evaluating subordinates. The highest possible rating in all of these categories (except attendance) was "outstanding," followed by "highly successful," "successful," "needs improvement," and "unsuccessful." For attendance, the highest available rating was "successful."

n5 Prior to March 1996, Stephens had accused, among others, Santos and Snably (who are white) of racial discrimination. By March 1996, Stephens had been discharged by Navy Federal, and her allegations are not directly at issue in this proceeding. However,

Stephens's experiences with Snably contributed to Simms's later suspicions that she, too, was the target of racial discrimination in the workplace.

n6 In her "special review" of October 25, 1996, Santos was scored as "needs improvement" in various areas in which she had scored "successful" or "highly successful" in her performance assessment of April 9, 1996, including interpersonal skills, communication skills, leadership, controlling operations, and evaluating subordinates. In the "special review," Santos was also chastised for, among other things, failing to "maintain[] control of the section," taking "a 'hands off' approach to supervising her employees," and failing "to communicate decisions clearly and positively."

n7 Santos has never filed an administrative charge of discrimination against Navy Federal. In denying Navy Federal's initial motion for summary judgment, however, the district court concluded that the EEOC's investigation of retaliation against Santos fell within the reasonable scope of its investigation into the allegations made by Simms. *EEOC v. Navy Fed. Credit Union*, No. 03-543, at 5-7 (E.D. Va. July 11, 2003). That ruling is not contested in this appeal.

n8 On June 24, 2002, Simms sued Navy Federal in the Eastern District of Virginia, asserting claims of racial discrimination and retaliation. The district court entered judgment in favor of Navy Federal on Simms's discrimination claim, but denied Navy Federal's motion for summary judgment on the claim of retaliation. *Simms v. Navy Fed. Credit Union*, No. 02-0900-A (E.D. Va. Aug. 27, 2002). The parties thereafter settled the

matter.

n9 Indeed, when Simms first filed her complaint against Navy Federal in the FCHRC, the misleading evaluation that Culbertson prepared and that Santos refused to sign figured prominently in Navy Federal's defense.

n10 Navy Federal sustained its burden of articulating a legitimate, non-retaliatory reason for its adverse employment action against Santos by presenting evidence that it had terminated her because she lacked supervisory skills.

n11 Navy Federal contests the evidence of the "Director's award," asserting that Santos received only a handwritten note of thanks for certain technical work she had performed. In the posture of this appeal, however, we are obliged to accept the facts in the light most favorable to the EEOC.

n12 We observe that this evidence (that Santos was actually fired for opposing the retaliation scheme against Simms) best supports Santos's claim of pretext. To overcome the burden of proving that the reason for termination advanced by Navy Federal was a pretext, Santos was not necessarily required to prove that she was a good supervisor. She needed only to prove that her lack of skill as a supervisor was not the cause of her termination. *See Price v. Thompson*, 380 F.3d 209, 212 (4th Cir. 2004) ("The plaintiff can prove pretext by showing that the [defendant's] explanation is unworthy of credence or by offering other forms of circumstantial evidence sufficiently probative of [retaliation].") (internal quotation marks omitted).

n13 Indeed, it appears that Santos's belief that Navy Federal was retaliating against Simms was not only reasonable but correct as well. The evidence of Navy Federal's scheme clearly warrants the conclusion that Navy Federal was retaliating against Simms. *Cf. LaFond v. General Physics Servs. Corp.*, 50 F.3d 165, 175-76 (2d Cir. 1995) (reversing summary judgment in favor of defendant-employer where plaintiff-employee presented evidence that defendant's "stated reason for discharging him was a pretext concealing a retaliatory motive"). Indeed, after Simms filed her complaint with the FCHRC, both the FCHRC and the EEOC concluded that Simms's retaliation complaint had merit. And, when Simms pursued her claims against Navy Federal in federal court, the district court denied summary judgment to Navy Federal on Simms's retaliation claim. *Simms v. Navy Fed. Credit Union*, No. 02-0900-A (E.D. Va. Aug. 27, 2002).

n14 Although the district court, by its Opinion of June 18, 2004, granted judgment in favor of Navy Federal on the laches issue, it had rejected a laches claim of Navy Federal's in its earlier ruling of July 11, 2003. *EEOC v. Navy Fed. Credit Union*, No. 03-543, at 8 (E.D. Va. July 11, 2003) ("It does not appear that the claim was neglected or abandoned by the [FCHRC] or that their efforts were dilatory or the result of unreasonable procrastination."). In fairness to the district court, its second ruling was made after discovery revealed more details concerning the FCHRC's handling of the Simms matter.

n15 A "FEP" (an acronym for "fair employment practices") or "deferral" agency is a state or local agency that enforces state and local civil rights laws. *See* Title

VII § 706(c), 42 U.S.C. § 2000e-5(c). The jurisdiction of such agencies overlaps that of the EEOC. *See* 29 C.F.R. § 1601.13(a)(3). In the spirit of limiting federal intrusion on state functions, such an agency enjoys substantial independence from the EEOC, but only if the jurisdiction in which the agency is organized has "a fair employment practice law" that the agency is empowered to enforce. *See* 29 C.F.R. § 1601.70(a). The FCHRC is such a deferral agency. *See* 29 C.F.R. § 1601.80.

n16 That the EEOC and the FCHRC operate autonomously is further demonstrated by their handling of the Simms matter. After the FCHRC referred the case to the EEOC, the EEOC, rather than simply adopting the FCHRC's findings, conducted its own investigation of the matter and decided to pursue a claim on behalf of Santos as well as Simms.

n17 Because the district court erred in resolving the issue of whether the EEOC unreasonably delayed, we need not reach the issue of whether Navy Federal was unduly prejudiced by any delay.

Filed 6/18/2004

Case No. 1:03cv543

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

NAVY FEDERAL CREDIT UNION,
Defendant.

MEMORANDUM ORDER

THIS MATTER is before the Court on Defendant Navy Federal Credit Union's Motion for Summary Judgment. This is a retaliation case. Plaintiff Equal Employment Opportunity Commission ("EEOC") asserts on behalf of Donna Santos[1], a former employee of Navy Federal Credit Union ("Navy Federal"), that she was subjected to retaliation in the work place. Plaintiff alleges this retaliation was in response to Ms. Santos' refusal to participate in Navy Federal's plan to retaliate against another employee, Tammy Simms, who had filed an internal discrimination claim.

Three issues exist before the Court. First, whether Plaintiff has stated a prima facie case of retaliation by showing Ms. Santos engaged in a protected activity, namely opposing what she reasonably and in good faith

believed was a scheme by Navy Federal to retaliate against Ms. Simms. Second, if Plaintiff has stated a prima facie case, whether Plaintiff has shown that Defendant's nondiscriminatory explanation for Ms. Santos' termination was mere pretext. Third, whether Plaintiff's claim should be barred by the doctrine of laches because it was unreasonably delayed and resulted in substantial prejudice to Defendant.

Because the Defendant's Motion for Summary Judgment demonstrates that there is no genuine issue of material fact for trial, the Court grants this motion. Specifically, the Court grants the Defendant's motion for three reasons. First, this Court finds that Ms. Santos could not have had a good faith belief that she was acting in opposition to retaliation against Ms. Simms, because Navy Federal's actions were not adverse to Ms. Simms, employment and therefore could not be considered retaliation. Second, the Court finds that Plaintiff failed to demonstrate that Defendant's nondiscriminatory explanation for Ms. Santos' termination was mere pretext. Third, Plaintiff's claims are barred by the doctrine of laches because the delay in investigating Ms. Simms' claim substantially prejudiced Defendant.

BACKGROUND

Ms. Santos was previously employed as a supervisor in the staffing section of Navy Federal. In March 1996 problems developed in Ms. Santos' section. Several employees in the section felt that Ms. Santos had lost control of her section and was no longer functioning well as a supervisor. In June 1996, Jan Herman, the head of the staffing and recruiting group, met with Ms.

Santos to discuss her performance. Problems continued in Ms. Santos' section and by August 1996, Ms. Herman became concerned that Ms. Santos was "more concerned in her own training and development ... than in her job as an NFCU supervisor." Def.'s Mem. Supp. Mot. Summ. J. Ex. 4.

Ms. Santos had particular trouble with Ms. Simms, one of her employees, who was refusing to do her assigned work. Additionally, Ms. Simms and another co-worker, Diane Snably did not get along. Ms. Simms felt that Ms. Snably was overly critical of her work and treated her differently than other employees who were not of African decent. Significant friction continued to exist between Ms. Simms and Ms. Snably. On September 16, 1996, Ms. Simms filed an internal request for resolution alleging Ms. Santos, Ms. Herman and Ms. Snably engaged in race, color, sex and age discrimination. The request was investigated internally and found to be without merit.

Ms. Santos alleges that Navy Federal then began a scheme to retaliate against Ms. Simms for filing the internal complaint. Ms. Santos alleges she was asked to participate in the scheme by scrutinizing Ms. Simms' performance, including her time and attendance records, and altering Ms. Simms' annual performance appraisal. Ms. Santos contends that she was instructed to grade Ms. Simms higher on her annual performance than Ms. Santos felt she deserved. When Ms. Santos initially refused to do so she was told she was being insubordinate.

On October 25, 1996, Ms. Herman gave Ms. Santos a special appraisal which placed her on probation for 180

days. Def.'s Mem. Supp. Mot. Summ. J. Ex. 21. The special appraisal identifies several areas where Ms. Santos was deficient as a supervisor. *Id.* Ms. Santos argues that the special appraisal was, in reality, a direct result of her refusal to participate in the scheme to retaliate against Ms. Simms. Subsequently, on February 14, 1997, Navy Federal determined that Ms. Santos had failed to improve her performance as a supervisor and terminated her employment.

In March 1997, Ms. Simms resigned from Navy Federal. On March 25, 1997, she filed a complaint of national origin discrimination with the Fairfax County Human Rights Commission ("FCHRC"). The complaint was cross-filed with the EEOC.

On February 6, 2001, after a delay of almost four years, FCHRC issued a cause finding of retaliation and a no-cause finding of discrimination on Ms. Simms' charge. The EEOC adopted FCHRC's findings and on May 27, 2003, the EEOC served upon Navy Federal the complaint that gave rise to this case. The complaint alleges that Ms. Santos was also retaliated against because she supported Ms. Simms' allegations.

Plaintiff seeks injunctive relief enjoining Defendant from engaging in retaliation against its employees, back pay awarded to Ms. Santos, compensation awarded to Ms. Santos for pecuniary and non-pecuniary losses suffered as a result of the alleged retaliation, punitive damages awarded to Ms. Santos and costs of litigation awarded to Plaintiff.

DISCUSSION

A. Standard of Review

Under Rule 56(c) of the Federal Rules of Civil Procedure, the Court must grant summary judgment if the moving party demonstrates that there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law. *See* Fed R. Civ. P. 56(c). In reviewing a motion for summary judgment, the Court views the facts in a light most favorable to the non-moving party.

Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 238 (1986). "Rule 56(e) requires the nonmoving party to go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). This standard of review sets forth the procedural framework for the Court's analysis; each subsection contains the rule of law that applies to each individual claim.

B. Analysis

i. Prima Facie Case

The Court holds that Plaintiff has failed to state a prima facie case of retaliation under Title VII because Ms. Santos could not have had a good faith belief that she was acting in opposition to the retaliation against Ms. Simms. In order to prevail in a retaliation claim, the plaintiff must first establish by a preponderance of the evidence a prima facie case for retaliation. *Laughlin v. Metro. Washington Airports Auth.*, 149 F.3d 253, 258 (4th Cir. 1998). A plaintiff must prove the following elements to sustain a prima facie case of retaliation:

(1) that the plaintiff engaged in protected activity; (2) that the employer took an adverse employment action against the plaintiff; and (3) that there was a causal link between the protected activity and the adverse employment action. *Id.* (citing *Hopkins v. Baltimore Gas and Elec. Co.*, 77 F.3d 745, 754 (4th Cir. 1996)).

Plaintiff fails to establish a claim of retaliation because she fails to demonstrate that Ms. Santos was engaged in a protected activity. Protected activity under Title VII is divided into two categories, opposition and participation. *Id.* at 257; *See also* 42 U.S.C. § 2000e-3(a). Plaintiff argues that Ms. Santos' protected activity was acting in opposition to Navy Federal's retaliation against Ms. Simms. However, Ms. Santos did not oppose Navy Federal's actions against Ms. Simms. In fact, Ms. Simms accused Ms. Santos of discriminatory behavior in her internal discrimination claim.

Moreover, for opposition to constitute protected activity the employee must have a reasonable and good faith belief that the practice opposed constituted a

violation of Title VII. *Dea v. Washington Suburban Sanitary Comm'n*, 11 Fed. Appx. 352, 357-8 (4th Cir. 2001) (citing *Bigge v. Albertsons*, 894 F.2d 1497, 1503 (11th Cir. 1990)). Ms. Santos could not in good faith have believed that Navy Federal's actions were in violation of Title VII because the actions she claims to have opposed were not adverse employment actions. For an action to be considered an adverse employment action, it must have an adverse effect on the "terms, conditions, or benefits of employment." *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001) (citing *Munday v. Waste Mgmt. of N. Am., Inc.*, 126 F.3d 239, 242 (4th Cir. 1997)).

Ms. Santos contends that after Ms. Simms filed her discrimination claim, Ms. Simms was subject to heightened surveillance and scrutiny of her time and attendance records. Administrative actions such as these do not rise to the level of adverse employment action. Ms. Santos also complains that Ms. Simms was unfairly graded and treated nasty by Ms. Snably, her co-worker. However, Ms. Snably's grading did not adversely affect the terms, conditions or benefits of Ms. Simms' employment. Additionally, simple co-worker friction in the workplace does not rise to the level of adverse employment action. Finally, Ms. Santos argues that she was instructed to give Ms. Simms a higher employment evaluation than she believed Ms. Simms deserved. By definition, increasing an employee's evaluation is not an adverse action.

As none of Ms. Santos' complaints constitute adverse action, the Court finds she could not have held a reasonable good faith belief that Navy Federal was retaliating against Ms. Simms for her discrimination

claim. Without this good faith belief, Ms. Santos was not acting in opposition to a violation under Title VII and her actions were therefore not protected. For these reasons, the Court holds that Plaintiff has failed to establish a prima facie case of retaliation and Defendant's Motion for Summary Judgment should be granted.

ii. Pretext

Even assuming, *arguendo*, that Plaintiff had established a prima facie case of retaliation, the Court holds that Plaintiff has failed to show that the Defendant's non-discriminatory explanations for Ms. Santos' termination were a pretext for retaliation.

If the plaintiff is able to establish a prima facie case of retaliation, the burden of production shifts to the defendant, who must articulate a legitimate, non-discriminatory reason for its action. Should the employer meet this burden, the plaintiff, in order to prevail, must prove again by a preponderance of the evidence that the defendant's articulated reason for its actions was a pretext for retaliation. *See Laughlin*, 149 F.3d at 258. *See also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981).

Defendant asserts that Ms. Santos was placed on probation and then fired because of problems with Ms. Santos' supervisory and management skills. Problems in Ms. Santos' section began in early 1996 and lasted until her termination. Ms. Santos had difficulty supervising her employees, including: managing the

conflict between Ms. Simms and Ms. Snably, Ms. Simms refusing to perform her share of the workload, and failing to maintain a productive work environment among her employees. *See* Def.'s Mem. Supp. Summ. J. Exs. 3, 9, 10. While it is true Ms. Santos was not put on special appraisal until after Ms. Simms filed her internal complaint, Defendant has identified that Ms. Santos' supervisory problems existed before Ms. Simms' complaint was made.

Plaintiff has presented evidence that Ms. Santos received various commendations sporadically throughout 1996. However, as Defendant points out, these commendations address Ms. Santos' technical proficiency, not her supervisory skills. Additionally, Ms. Santos' favorable evaluation in April of 1996 covers the period of time before Ms. Santos' supervisory problems began to surface. Plaintiff has presented no evidence to directly rebut Defendant's evidence that Ms. Santos' supervisory skills were deficient.

Since Plaintiff is unable to meet her ultimate burden of persuasion that the legitimate, nondiscriminatory reasons Defendant proffers for its termination of Ms. Santos are pretext, there is no genuine issue of material fact in dispute.

iii. Doctrine of Laches

Additionally, Defendant has shown that Summary Judgment must be granted because of Plaintiff's failure to file the suit in a reasonable period of time, resulting in prejudice to Defendant.

The doctrine of laches is an affirmative defense which,

"imposes on the defendant the ultimate burden of proving '(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990) (quoting *Costello v. United States*, 365 U.S. 265, 282 (1961)).

A lack of diligence exists where "the plaintiff delayed inexcusably or unreasonably in filing suit." *Id.* (quoting *Nat'l Wildlife Fed'n v. Burford*, 835 F. 2d 305, 318 (D. C. Cir. 1987)). Courts have found a delay unreasonable when it was caused by an agency's failure to properly conduct an investigation. *See Equal Employment Opportunity Comm'n v. Peterson, Howell & Heather, Inc.*, 702 F. Supp. 1213, 1222 (D. Md. 1989) (citing *Equal Employment Opportunity Comm'n v. Liberty Loan Corp.*, 584 F. 2d 853, 857 (8th Cir. 1978)) ; *see also Equal Employment Opportunity Comm'n v. Martin Processing, Inc.*, 533 F. Supp. 227, 229 (W. D. Va. 1982) (citing *Liberty Loan Corp.*).

Ms. Simms filed her complaint with FCHRC on April 10, 1997. As a result of significant performance problems on the part of the FCHRC investigator, FCHRC did not issue its findings until nearly four years later on February 6, 2001. As a result of this delay, the EEOC was unable to adopt FCHRC's findings and move forward until July 2001. The Court finds that the failure of the FCHRC investigator to properly conduct the investigation into Ms. Simms' claim was an unreasonable delay.

In addition to an unreasonable delay, the defendant must demonstrate that the delay created undue prejudice. *White*, 909 F.2d at 102. Defendant

demonstrates undue prejudice by showing that Ms. Santos' recollection of the events at issue in this case is critically absent after six years. Ms. Santos is a critical witness in this case. She is unable to recall important issues regarding both Ms. Simms' original discrimination claim and the circumstances around her own special review. In fact, during her deposition, Ms. Santos answered "I don't remember" over 300 times. The Court finds that the inability of the complaining witness to accurately recall the circumstances of the complaint has created undue prejudice against the Defendant.

As Defendant has demonstrated the existence of both unreasonable delay and undue prejudice, the Court also grants the motion for summary judgment based upon on the doctrine of laches.

CONCLUSION

In conclusion, Defendant's Motion for Summary Judgment is granted. Plaintiff has not demonstrated a prima facie case of retaliation against Ms. Santos because Navy Federal's actions against Ms. Simms did not constitute adverse employment action and therefore Ms. Santos could not in good faith have believed that she was acting in opposition to retaliation by Navy Federal against Ms. Simms. Moreover, Plaintiff failed to demonstrate that Navy Federal's non-discriminatory explanation for Ms. Santos' termination was pretext. Finally, FCHRC's delay in investigating Ms. Simms' claim resulted in unreasonable delay and substantial prejudice against Navy Federal, and therefore Plaintiff's claims are barred by the doctrine of laches.

For the foregoing reasons, it is hereby ORDERED that Defendants' Motion for Summary Judgment is GRANTED.

An appropriate order entering judgment in favor of Defendant pursuant to Rule 58 of the Federal Rules of Civil Procedure will issue shortly.

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 18th day of June, 2004.
s/ Gerald Bruce Lee
Gerald Bruce Lee

United States District Judge
Alexandria, Virginia 06/18/04

Footnote

fn1Donna Santos is now known as Moira Flanagan. For the sake of clarity she is referred to throughout this opinion as "Ms. Santos."

FILED November 8, 2005
No. 04-2058

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

NAVY FEDERAL CREDIT UNION,
Defendant-Appellee.

On Petition for Rehearing and Rehearing En Banc

The appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge King, Judge Gregory, and Senior Judge Hamilton.

For the Court,
/s/ Patricia S. Connor
Clerk

Statutes

42 U.S.C. § 2000e-4(g)(1)

(g) *Powers of the Commission*

The Commission shall have power--

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

42 U.S.C. § 2000e-5(c) and (e)(1)

(c) ***State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings***

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, ...

(e) ***Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system***

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. § 2000e-8(b)

(b) ***Cooperation with State and local agencies administering State fair employment practices laws; participation in and contribution to research and other projects; utilization of services; payment in advance or reimbursement; agreements and rescission of agreements***

The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the

consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. . . .

Regulations

29 C.F.R. § 1601.13(a)(3)(i)-(ii) and (c)

(a) *Initial presentation of a charge to the Commission.*

(3) Charges arising in jurisdictions having a FEP agency with subject matter jurisdiction over the charges are to be processed in accordance with the Commission's deferral policy set forth below and the procedures in paragraph (a)(4) of this section.

(i) In order to give full weight to the policy of section 706(c) of title VII, which affords State and local fair employment practice agencies that come within the provisions of that section an opportunity to remedy alleged discrimination concurrently regulated by Title VII or the ADA and State or local law, the Commission adopts the following procedures with respect to allegations of discrimination filed with the Commission. It is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and local agencies. The Commission shall endeavor to maintain close communication with the State and local agencies with respect to all matters forwarded to such agencies and shall provide such assistance to State and local agencies as is permitted by law and as is practicable.

(ii) Section 706(c) of title VII grants States and their political subdivisions the exclusive right to process allegations of discrimination filed by a person other than a Commissioner for a period of 60 days (or 120 days during the first year after the effective date of the qualifying State or local law). This right exists where, as set forth in § 1601.70, a State or local law prohibits the employment practice alleged to be unlawful and a State or local agency has been authorized to grant or seek relief. After the expiration of the exclusive processing period, the Commission may commence processing the allegation of discrimination.

(c) ***Agreements with Fair Employment Practice Agencies.*** Pursuant to section 705(g)(1) and section 706(b) of title VII, the Commission shall endeavor to enter into agreements with FEP agencies to establish effective and integrated resolution procedures. Such agreements may include, but need not be limited to, cooperative arrangements to provide for processing of certain charges by the Commission, rather than by the FEP agency during the period specified in section 706(c) and section 706(d) of title VII.

29 C.F.R. § 1601.70(a)

(a) State and local fair employment practice agencies or authorities which qualify under section 706(c) of Title VII and this section shall be designated as "FEP agencies." The qualifications for designation under section 706(c) are as follows:

(1) That the State or political subdivision has a fair employment practice law which makes unlawful employment practices based upon race, color, religion, sex, national origin or disability; and

(2) That the State or political subdivision has either established a State or local authority or authorized an existing State or local authority that is empowered with respect to employment practices found to be unlawful, to do one of three things: To grant relief from the practice; to seek relief from the practice; or to institute criminal proceedings with respect to the practice.

29 C.F.R. § 1601.74(a)

(a) The designated FEP agencies are:
Alaska Commission for Human Rights

Alexandria (VA) Human Rights Office
Allentown (PA) Human Relations Commission
Anchorage (AK) Equal Rights Commission
Anderson (IN) Human Relations Commission
Arizona Civil Rights Division
Arlington County (VA) Human Rights Commission
Austin (TX) Human Relations Commission
Baltimore (MD) Community Relations Commission
Bloomington (IL) Human Relations Commission
Bloomington (IN) Human Rights Commission
Broward County (FL) Human Relations Commission
California Department of Fair Employment and Housing
Charleston (WV) Human Rights Commission
City of Salina (KS) Human Relations Commission and Department
City of Springfield (IL) Department of Community Relations
Clearwater (FL) Office of Community Relations
Colorado Civil Rights Commission
Colorado State Personnel Board
Commonwealth of Puerto Rico Department of Labor
Connecticut Commission on Human Rights and Opportunity
Corpus Christi (TX) Human Relations Commission
Dade County (FL) Fair Housing and Employment Commission
Delaware Department of Labor
District of Columbia Office of Human Rights
Durham (NC) Human Relations Commission
East Chicago (IN) Human Rights Commission
Evansville (IN) Human Relations Commission
Fairfax County (VA) Human Rights Commission
Florida Commission on Human Relations

Fort Dodge-Webster County (IA) Human Rights Commission
Fort Wayne (IN) Metropolitan Human Relations Commission
Fort Worth (TX) Human Relations Commission
Gary (IN) Human Relations Commission
Georgia Office of Fair Employment Practices
Hawaii Department of Labor and Industrial Relations
Hillsborough County, Florida Equal Opportunity and Human Relations Department
Howard County (MD) Human Rights Commission
Huntington (WV) Human Relations Commission
Idaho Human Rights Commission
Illinois Department of Human Rights
Indiana Civil Rights Commission
Iowa Civil Rights Commission
Jacksonville (FL) Equal Employment Opportunity Commission
Kansas City (KS) Human Relations Department
Kansas City (MO) Human Relations Department
Kansas Human Rights Commission
Kentucky Commission on Human Rights
Lee County (FL) Department of Equal Opportunity
Lexington-Fayette (KY) Urban County Human Rights Commission
Lincoln (NE) Commission on Human Rights
Louisiana (LA) Commission on Human Rights
Louisville and Jefferson County (KY) Human Relations Commission
Madison (WI) Equal Opportunities Commission
Maine Human Rights Commission
Maryland Commission on Human Relations
Mason City (IA) Human Rights Commission
Massachusetts Commission Against Discrimination
Michigan City (IN) Human Rights Commission

Michigan Department of Civil Rights
Minneapolis (MN) Department of Civil Rights
Minnesota Department of Human Rights
Missouri Commission on Human Rights
Montana Human Rights Division
Montgomery County (MD) Human Relations Commission
Nebraska Equal Opportunity Commission
Nevada Commission on Equal Rights of Citizens
New Hampshire Commission for Human Rights
New Hanover (NC) Human Relations Commission
New Haven (CT) Commission on Equal Opportunities
New Jersey Division of Civil Rights, Department of Law and Public Safety
New Mexico Human Rights Commission
New York City (NY) Commission on Human Rights
New York State Division on Human Rights
North Carolina State Office of Administrative Hearings
North Dakota Department of Labor
Ohio Civil Rights Commission
Oklahoma Human Rights Commission
Omaha (NE) Human Relations Department
Orange County (NC) Human Relations Commission
Oregon Bureau of Labor
Orlando (FL) Human Relations Department
Paducah (KY) Human Rights Commission
Palm Beach County (FL) Office of Equal Opportunity
Pennsylvania Human Relations Commission
Philadelphia (PA) Commission on Human Relations
Pinellas County (FL) Affirmative Action Office
Pittsburgh (PA) Commission on Human Rights
Prince George's County (MD) Human Relations Commission
Prince William County (VA) Human Rights Commission

Reading (PA) Human Relations Commission
Rhode Island Commission for Human Rights
Richmond County (GA) Human Rights Commission
Rockville (MD) Human Rights Commission
St. Louis (MO) Civil Rights Enforcement Agency
St. Paul (MN) Department of Human Rights
St. Petersburg (FL) Human Relations Division
Seattle (WA) Human Rights Commission
Sioux Falls (SD) Human Relations Commission
South Bend (IN) Human Rights Commission
South Carolina Human Affairs Commission
South Dakota Division of Human Rights
Springfield (OH) Human Relations Department
Tacoma (WA) Human Relations Commission
Tampa, Florida Office of Community Relations
Tennessee Commission for Human Development
Texas Commission on Human Rights
Topeka, Kansas Human Relations Commission
Utah Industrial Commission, Anti-Discrimination Division
Vermont Attorney General's Office, Civil Rights Division
Vermont Human Rights Commission
Virgin Islands Department of Labor
Virginia Council on Human Rights
Washington Human Rights Commission
West Virginia Human Rights Commission
Wheeling (WV) Human Rights Commission
Wichita Falls (TX) Human Relations Commission
Wisconsin Equal Rights Division, Department of Industry, Labor and Human Relations
Wisconsin State Personnel Commission
Wyoming Fair Employment Practices Commission
York (PA) Human Relations Commission
Youngstown (OH) Human Relations Commission

29 C.F.R. § 1601.75(a)

(a) The Commission may certify designated FEP agencies based upon the past, satisfactory performance of those agencies. The effect of such certification is that the Commission shall accept the findings and resolutions of designated FEP agencies in regard to cases processed under contracts with those agencies without individual, case-by-case substantial weight review by the Commission except as provided in §§ 1601.76 and 1601.77 of this part.

29 C.F.R. § 1601.80

The designated FEP agencies receiving certification by the Commission are as follows:
Alaska Commission for Human Rights
Alexandria (VA) Human Rights Office
Anchorage (AK) Equal Rights Commission
Arizona Civil Rights Division
Arlington County (VA) Human Rights Commission
Austin Human Relations Commission
Baltimore (MD) Community Relations Commission
Broward County (FL) Human Relations Commission
California Department of Fair Employment and Housing
City of Tampa Office of Human Rights
Clearwater (FL) Office of Community Relations
Colorado Civil Rights Division
Connecticut Commission on Human Rights and Opportunity
Corpus Christi Human Relations Commission

Dade County (FL) Fair Housing and Employment Commission
Delaware Department of Labor
District of Columbia Office of Human Rights
East Chicago (IN) Human Rights Commission
Fairfax County (VA) Human Rights Commission
Florida Commission on Human Rights
Fort Wayne (IN) Metropolitan Human Relations Commission
Forth Worth (TX) Human Relations Commission
Gary (IN) Human Relation Commission
Georgia Commission on Equal Opportunity
Hawaii Department of Labor and Industrial Relations
Howard County (MD) Office of Human Rights
Idaho Human Rights Commission
Illinois Department of Human Rights
Indiana Civil Rights Commission
Iowa Civil Rights Commission
Jacksonville (FL) Equal Employment Opportunity Commission
Kansas Commission on Civil Rights
Lee County Office of Equal Opportunity
Lexington-Fayette (KY) Urban County Human Rights Commission
Louisville and Jefferson County Human Relations Commission
Madison Equal Opportunity Commission
Maine Human Rights Commission
Maryland Commission on Human Relations
Massachusetts Commission Against Discrimination
Michigan Department of Civil Rights
Minneapolis (MN) Department of Civil Rights
Minnesota Department of Human Rights
Missouri Commission on Civil Rights
Montana Human Rights Division

Nebraska Equal Opportunity Commission
Nevada Commission on Equal Rights of Citizens
New Hampshire Commission for Human Rights
New Hanover Human Relations Commission
New Jersey Division on Civil Rights
New Mexico Human Rights Commission
New York City (NY) Commission on Human Rights
New York State Division on Human Rights
North Carolina Civil Rights Division, Office of Administrative Hearings
North Dakota Department of Labor
Ohio Civil Rights Commission
Oklahoma Human Rights Commission
Omaha (NE) Human Relations Department
Oregon Bureau of Labor
Orlando (FL) Human Relations Department
Palm Beach County Office of Equal Opportunity
Pennsylvania Human Relations Commission
Philadelphia Commission on Human Relations
Pittsburgh Commission on Human Relations
Puerto Rico Department of Labor and Human Resources
Rhode Island Commission for Human Rights
St. Louis, Missouri Civil Rights Enforcement Agency
St. Paul Department of Human Rights
St. Petersburg (FL) Human Relations Department
Seattle (WA) Human Rights Commission
South Bend (IN) Human Rights Commission
South Carolina Human Affairs Commission
South Dakota Division of Human Rights
Tacoma (WA) Human Relations Division
Tennessee Human Rights Commission
Texas Commission on Human Rights
Utah Industrial Commission, Anti-Discrimination Division

Vermont Attorney General's Office, Civil Rights Division
Virgin Islands Department of Labor
Washington Human Rights Commission
West Virginia Human Rights Commission
Wisconsin Equal Rights Division, Department of Industry, Labor and Human Relations
Wyoming Fair Employment Practices Commission

JAN 02 1997

Worksharing Agreement Between The Fairfax County Human Rights Commission and The Equal Employment Opportunity Commission Washington Field Office Fiscal Year 1997

I. Introduction

A. The Fairfax County Human Rights Commission, hereinafter referred to as the FEPA, has jurisdiction over allegations of employment discrimination based on race, color, sex, age, national origin, religion, disability, or marital status, filed against employers of four or more employees within Fairfax County, Virginia, pursuant to Chapter 11 (Human Rights) of the 1976 code of the County of Fairfax, Virginia, as amended.

The Equal Employment Opportunity Commission, hereinafter referred to as the EEOC, has jurisdiction over allegations of employment discrimination occurring throughout the United States where such charges are based on race, color, religion, sex, or national origin, all pursuant to Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e et seq.) (hereinafter referred to as Title VII). The EEOC has jurisdiction to investigate and determine charges of discrimination based on age (40 or older) under the Age Discrimination in Employment Act of 1967, as amended (ADEA) (29 U.S.C. § 621 et. seq.), for unequal wages based on sex under the Equal Pay Act of 1963 (EPA) (29 U.S.C. § 206), and over allegations of employment discrimination based on disability pursuant to Title I of the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.).

B. In recognition of, and to the extent of the common jurisdiction and goals of the two Agencies, and in consideration of the mutual promises and covenants contained herein, the FEPA and the EEOC hereby agree to the terms of this Worksharing Agreement, which is designed to provide individuals with an efficient procedure for obtaining redress for their grievances under appropriate Fairfax County or Federal laws.

II. Filing of Charges of Discrimination

A. In order to facilitate the assertion of employment rights, the EEOC and the FEPA each designate the other as its agent for the purpose of receiving and drafting charges. Regardless of whether the charge is jurisdictional with the receiving Agency, the date of receipt by either Agency will be deemed to be the date of receipt for the other Agency.

B. The FEPA shall take all charges alleging a violation of Title VII, the ADEA, or the ADA where the parties have mutual jurisdiction and, as appropriate, refer them to the EEOC, so long as the allegations meet the minimum requirements of those Acts.

C. Each Agency will inform individuals of their rights to file charges with the other Agency and/or assist any person alleging employment discrimination to draft a charge in a manner that will satisfy the requirements of both Agencies to the extent of their common jurisdiction.

Normally, once an Agency begins an investigation, it resolves the charge. Charges may be transferred

between the EEOC and the FEPA only by mutual agreement. Each Agency will advise Charging Parties that charges will be resolved by the Agency taking the charge except when the Agency taking the charge lacks jurisdiction or when the charge is to be transferred in accordance with Section III, Division of Initial Charge-Processing Responsibilities.

D. For charges that are to be dual-filed, each Agency will use EEOC Charge Form 5 (or alternatively, an employment discrimination charge form that, within statutory limitations, is acceptable in form and content to the EEOC and the FEPA) to draft charges. When a charge is taken based on disability, the nature of the disability will not be disclosed on the face of the charge.

E. Each Agency will make every effort to transmit electronically all dual-filed charges to the other Agency within two working days of receipt. The Agency that initially takes the charge will provide notice of the charge to the Respondent within ten calendar days of receipt. The Agency will also send to the other Agency a hard copy of the charge and Form 212-A within ten calendar days of receipt.

1. The EEOC will use EEOC Form 212-A, Charge Transmittal to send charges to the FEPA. The form will be completed in duplicate. The FEPA will complete the bottom portion of the form and return it within ten working days of receipt. If other transmittal arrangements are agreed upon, receipt by the FEPA must be documented.

2. The FEPA must also transmit charges to the

EEOC using this form. The EEOC will complete the bottom portion of the form and return it to the FEPA within ten working days of receipt.

3. Whenever the original of the Form 212-A is sent or returned to the FEPA, the EEOC will retain a copy in the charge file. The EEOC number and the FEPA's charge number must be entered on all transmittals between the EEOC and the FEPA.

F. Each Agency agrees that it will notify both the Charging Party and Respondent of the dual-filed nature of each such charge it receives for initial processing and explain the rights and responsibilities of the parties under the applicable Federal, state, or local statutes.

G. The delegation of authority to receive charges contained in Paragraph II.A. does not include the right of one Agency to determine the jurisdiction of the other Agency over a charge.

III. Division of Initial Charge-Processing Responsibilities

In recognition of the statutory authority granted to the FEPA by Section 706(c) and 706(d) of Title VII as amended, by Title I of the Americans with Disabilities Act, and in recognition of the referral of age discrimination charges pursuant to the Age Discrimination in Employment Act of 1967, the primary responsibility for resolving dual-filed charges between the FEPA and the EEOC will be divided as follows.

A. The FEPA will process all Title VII, ADA, and ADEA charges over which it has jurisdiction, whether or not the Charging Party first contacts the FEPA or the EEOC, with the exception of those charges listed in paragraph III.B. below.

1. The FEPA agrees to conduct all intake interviews and perfect all charges that are within the jurisdiction of the FEPA. The EEOC will refer to the FEPA all potential charging parties whose claims appear to be within the FEPA's jurisdiction, along with a standard EEOC questionnaire if they visited the EEOC office.

As part of perfecting the charge, the FEPA agrees to serve notice to the Respondent within ten days of receipt, dual-file the charge with the EEOC, and also dual-file any charge alleging a violation of the ADEA with the Virginia Council on Human Rights.

If a potential charging party comes to the EEOC and has already visited the FEPA, and has had his or her charge rejected even though jurisdictional with the FEPA, then the EEOC will conduct the intake interview, perfect the charge and investigate the charge. This type of charge will be dual-filed with the FEPA but will not be sent to the FEPA for investigation and, thus, will not be available for contract credit to the FEPA.

2. In particular, the FEPA will initially process the following types of charges:

-- Any charge alleging retaliation for filing a charge with the FEPA or cooperating with the FEPA;

-- Any charge where the FEPA is party to a conciliation agreement or a consent decree that, upon mutual conciliation and agreement, is relevant to the disposition of the charge. The FEPA will provide the EEOC with an ongoing list of all conciliation agreements and consent decrees that have features relevant to the disposition of subsequent charges;

-- All charges that allege more than one basis of discrimination where at least one basis is not covered by the laws administered by the EEOC but is covered by the FEPA ordinance, or where the EEOC is mandated by Federal court decision or by internal administrative EEOC policy to dismiss the charge, but the FEPA can process that charge;

-- All charges against Respondents that are designated for initial processing by the FEPA in a supplementary memorandum to this Agreement;

-- All disability-based charges against Respondents over which the EEOC does not have jurisdiction.

B. For charges to be initially processed by the EEOC, the FEPA waives its right of exclusive jurisdiction to initially process such charges for a period of 60 days for

the purpose of allowing the EEOC to proceed immediately with the processing of such charges before the 61st day.

The EEOC will initially process the following charges:

-- All Title VII or ADA charges received by either Agency 240 days or more after the date of violation;

-- EPA charges or concurrent charges alleging a violation of the EPA;

-- All charges against the FEPA or its parent organization where such parent organization exercises direct or indirect control over the charge decision making process;

-- All charges filed by EEOC Commissioners;

-- All directed investigations by the EEOC under the ADEA and the EPA.

-- Charges also covered by the Immigration Reform and Control Act;

-- Complaints referred to the EEOC by the Department of Justice, Office of Federal Contract Compliance, or Federal fund-granting agencies under 29 CFR Sec. 1640, 1641, and 1691 and class complaints retained by these agencies for action;

-- Any charge where the EEOC is a party to

a conciliation agreement or a consent decree that, upon mutual consultation and agreement, is relevant to the disposition of the charge. The EEOC will notify the FEPA of all conciliation agreements and consent decrees that have features relevant to the disposition of subsequent charges;

-- Any charge alleging retaliation for filing a charge with the EEOC or for cooperating with the EEOC; and

-- All charges against Respondents that are designated for initial processing by the EEOC in a supplementary memorandum to this Agreement.

C. Notwithstanding any other provision of the Agreement, the FEPA or the EEOC may request to be granted the right to initially process any charge. Such variations shall not be inconsistent with the objectives of this Worksharing Agreement or the Contracting Principles.

D. Each Agency will on a quarterly basis notify the other of all cases in litigation and will notify each other when a new suit is filed. As charges are received by one Agency against a Respondent on the other Agency's litigation list, a copy of the new charge will be sent to the other Agency's litigation unit within ten working days.

E. The EEOC will not defer or refer any charge for the FEPA to process that is not jurisdictional on its face with both Agencies. If it is apparent that one Agency

might have jurisdiction when another does not, then the Charging Party will be referred to the appropriate Agency.

IV. FEPA Processing of Charges under the ADA

A. The FEPA's law is similar to the ADA, but has the following important differences:

1. The ordinance on its face appears to exclude alcoholism from coverage. The FEPA, however, states that it follows the ADA standards with respect to alcoholism.

2. The ordinance does not enunciate a standard for evaluating safety requirements. The FEPA, however, applies the ADA direct threat standard when analyzing safety issues.

3. The ordinance contains no restrictions on disability-related inquiries and medical examinations of applicants and employees. The FEPA, however, interprets the law to include the ADA restrictions.

4. The ordinance does not contain a provision prohibiting discrimination on the basis of a relationship or an association with an individual with a disability. The FEPA, however, interprets the law to include such a prohibition.

B. Recognizing the differences set forth in "A" above, the FEPA and the EEOC agree that the FEPA will transfer to the EEOC for initial processing each disability charge it originally receives where it will not

receive and resolve all alleged issues in a manner consistent with all requirements, standards, prohibitions, and restrictions set forth in the ADA.

V. Exchange of Information

A. Both the FEPA and the EEOC shall make available for inspection and copying to appropriate officials from the other Agency any information that may assist each Agency in carrying out its responsibilities. Such information shall include, but not necessarily be limited to, investigative files, conciliation agreements, staffing information, case management printouts, charge processing documentation, and any other material and data as may be related to the processing of dual-filed charges or administration of the contract.

B. The Agency accepting information agrees to comply with any confidentiality requirements imposed on the Agency providing the information. With respect to all information obtained from the EEOC, the FEPA agrees to observe the confidentiality provisions of Title VII, the ADEA, the EPA, and the ADA.

Each agency agrees to bind its volunteers and/or its contractors/contract employees who are retained to process dual-filed charges to these same confidentiality requirements. Each agency agrees to require such volunteers and contractors/contract employees to sign a confidentiality agreement. That agreement will state, at a minimum, that the person may not disclose the existence of a charge, or any information obtained during the processing of a charge, with anyone other than the parties, their representatives, witnesses relevant to the investigation of the case, and EEOC or

FEPA employees. Any disclosure associated with the notice of and holding of a pubic hearing by the FEPA will not be deemed in violation of these confidentiality requirements.

C. In order to expedite the resolution of charges or facilitate the working of this Agreement, either Agency may request or permit personnel of the other Agency to accompany or to observe its personnel when processing a charge.

VI. EEOC Issuance of Subpoenas

A. The EEOC and the FEPA recognize that the sharing of investigative resources is appropriate and beneficial to the shared objectives of the agencies. To further effectuate the objectives of the EEOC and the FEPA, and to increase the efficiency of both agencies' investigatory processes, the EEOC will, pursuant to the following procedures, assert its concurrent jurisdiction in order to issue administrative subpoenas in cases under active investigation by the FEPA. These procedures are adopted pursuant to sections 705(g)(1). 709, and 710 of Title VII (42 U.S.C. 2000e-4(g)(1) 2000e-8, and 2000e-9); section 107(a) of the ADA (42 U.S.C. 12117 (a)); and sections 6 and 7(a) of the ADEA (29 U.S.C. 625 and 626(a)).

B. The EEOC will issue subpoenas on behalf of the FEPA to

1. obtain documents, records, and other information from a Respondent or third party; and

2. secure a witness' presence for an interview.

C. When the FEPA believes that the issuance of a subpoena is necessary, it will

1. submit a memorandum explaining the relevance of the documents or witness testimony sought;

2. provide written documentation of all previous efforts to secure the needed information;

3. submit a completed copy of the subpoena, which shall state that all documents, records, and other information is returnable to the FEPA as EEOC's agent. In cases where a subpoena is issued to secure a witness' presence, the interview will take place at the location designated by the FEPA and will be conducted by the FEPA representative.

D. The FEPA will advise all subpoenaed entities and persons that any petition to administratively quash a subpoena issued under Title VII or the Americans with Disabilities Act should be filed with the EEOC pursuant to 29 C.F.R. 1601.16 If a petition to quash a subpoena is filed with the FEPA, the FEPA will promptly refer the petition to the EEOC and advise the petitioner of this action.

The FEPA will advise all subpoenaed entities and persons that an EEOC subpoena issued pursuant to the Age Discrimination in Employment Act is not appealable, pursuant to 29 C.F.R. 1626.16.

E. All decisions to issue and enforce a subpoena will be made by the EEOC on a case-by-case basis.

VII. Resolution of Charges

A. Both agencies will adhere to the procedures set out in EEOC's Order 916, Substantial Weight Review Manual, and the State and Local Handbook. If there are procedural changes at any point during the contract year, the Agencies agree to renegotiate the terms of this section, as appropriate.

B. For the purpose of according substantial weight to the FEPA final finding and order, the FEPA must submit to the EEOC copies of all documents pertinent to substantial weight review. The evaluation will be designed to determine whether the following items have been addressed in a manner sufficient to satisfy EEOC requirements, including, but not limited to;

1. jurisdictional requirements,

2. investigation and resolution of all relevant issues alleging personal harm with appropriate documentation and using proper theory,

3. relief, if appropriate,

4. mechanisms for monitoring and enforcing compliance with all terms of conciliation agreements, orders after public hearings, or consent orders to which the FEPA is a party.

C. In order to be eligible for contract credit and/or payment, submissions must meet all the substantive

and administrative requirements as stipulated in the 1996 Contracting Principles. In particular, FEPA reports on EEOC Forms 322 and 472 and accompanying closing documents must be received by the EEOC no later than the eighth day after the reporting month, except at the end of a quarter, when the deadline is the fifth day.

D. For the purposes of determining eligibility for contract payment, a final action is defined as the point after which the charging party has no administrative recourse, appeal, or other avenue of redress available under applicable state and local statutes.

VIII. Implementation of the Worksharing Agreement

A. Each Agency will designate a person as liaison official for the other Agency to contact concerning the day-to-day implementation for the Agreement. The liaison for the FEPA will be Michael Cash, Deputy Director. The liaison official for the EEOC will be Laura W. Nawrocki, Acting State and Local Coordinator.

B. The Agencies will monitor the allocation of charge-processing responsibilities as set forth in the Agreement.

Where it appears that the overall projection appears inappropriate the appropriate portions of this Agreement will be modified to ensure full utilization of the investigation and resolution capacities of the FEPA and rapid redress for allegations of unlawful employment discrimination.

C. The EEOC will provide original forms to be copied by the FEPA, in accordance with the regulations and the Compliance Manual, to be used by the FEPA in correspondence with Charging Parties and Respondents.

D. This Agreement shall operate from October 1, 1996 to September 30 in the year the contract ends and may be renewed or modified by mutual consent of the parties.

I have read the foregoing Worksharing Agreement and I accept and agree to the provisions contained therein.

Date 1/10/97
s/ Susan Buckingham Reilly
Susan Buckingham Reilly, Director
Equal Employment Opportunity Commission
Washington Field Office

Date 1/5/97
s/ Fred L. Allen
Fred L. Allen, Executive Director
Fairfax County Human Rights Commission